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No. 1178

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In the

Supreme Court of the United States

OCTOBER TERM, 1966.

CATHERINE MUTH, Administratrix of the Estate of CLEM MUTH, Deceased; and MOLLIE DARR, Administratrix of the Estate of KURT DARR Deceased,

Petitioners,

vs.

HARRIET ATLASS and CHICAGO TITLE AND TRUST COMPANY, Executors of the Will of H. LESLIE ATLASS,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Motion to Use the Former Record

(Brief pp. 1-2)

Respondents have moved this Court "to use the record and exhibits in Causes Nos. 709 and 733, October Term, 1965, in connection with its present consideration of the petition for certiorari filed herein." The entire record in the court below (except, of course, the proceedings on remand which had not taken place) accompanied the former petitions. As the relief sought by the motion repre-

sents a part of the immediate relief sought by the petition for writ of certiorari, the motion is unopposed.

Respondents' Attack Upon Counsel and Omission (Brief, pp. 1-2, Appendix B)

As before, instead of discussing the questions presented, respondents' have filed a "reply brief" attacking the integrity of counsel. The character of the brief suggests, no doubt inadvertently, two additional reasons for granting the writ, i.e., to caution members of the bar of this Court in their conduct towards one another and in any attempts to mislead this Court. It is wasteful of the time of this Court for counsel to disregard this Court's rules and to submit a brief such as we here refer to as a brief in opposition.

As before (brief in opposition in Nos. 709 and 733, October Term, 1965), Appendix B of respondents' brief in opposition purports to contain the findings of fact and conclusions of law of the trial judge entered June 12, 1964. However, several pages thereof are missing. These pages were in the copies of the printed appendix in the court below on the first appeal, pp. 79-81, filed with the Muth petition, No. 709, October Term, 1965, and also appeared as an appendix, pp. 26-28a in the Darr petition, No. 733, October Term, 1965. They now may be found conveniently in Appendix B to the present petition, pp. 12a-14a.

The missing pages are believed to be important as they demonstrate the trial court's intention to deny exoneration by reason of proximately causative Jones Act negligence. The trial judge indicated his reliance upon *Marceau* v. *Great Lakes Transit Corporation,* 146 F. 2d 416 (2nd Cir. 1945), Cert. Denied, 324 U.S. 972 (1945), which was a Jones Act case. (Petition, p. 12a))

The Concurrent Findings Rule Is Not Applicable

(Brief, p. 3)

The district judge did not find *against* petitioners on the exoneration from Jones Act negligence issue. Respondents' brief in opposition erroneously suggests that the court below on the first appeal merely affirmed findings exonerating the employer so that the concurrent finding rule should dispose of this petition.

It is true that petitioners here were appellants on the first appeal. But petitioners appealed from a judgment limiting the employer's Jones Act liability to the value of his pleasure yacht. Petitioners contended below that respondents had failed to prove lack of privity or knowledge under the Limitation of Liability Act. Petitioners also assigned error to findings that the deceased seamen were, in part, responsible by reason of their own contributory negligence when they drank alcoholic beverages with knowledge that access to the vessel was hazardous. (Finding No. 40; Petition, p. 10a)

However, the court below disposed of the first appeal on respondents' cross-appeal (1) by interpreting the trial judge's findings as containing no finding of proximately causative negligence on the part of Atlass or any of his agents, (2) by interpreting Finding No. 41 (Petition, p. 10a) as apparently exonerating Atlass from all liability, and (3) by holding that the decedents' conduct was gross misconduct barring recovery under the Jones Act. It did not reach petitioners' assignments of error.

The Irrelevance of the Finding on the Limitation Issue

(Brief, pp. 3-6)

The trial judge found that the employer was not personally or individually negligent (Petition, p. 5; Finding

of Fact, 41, Petition, p. 10a) and allowed limitation of liability.

It is clear, however, that he did not intend thereby to exonerate the employer from all negligence. (Petition, pp. 7-8, 8a, 10a, 12a, 16a; Appellants' Brief and Appendix in the court below on the second appeal, pp. 20a-34a, 37a-39a.)

It is a mistake at best to take Finding No. 41 that Atlass was not *personally* responsible and interpret it as a finding that there was no employer negligence.

The District Judge explained Finding 41 prior to the first appeal:

> "That is the basis of the conclusion that he wasn't responsible; that he had no privity or knowledge." (Trans. 1655-1657, Appellants' Brief in the Court of Appeals on the First Appeal, p. 37.)

On remand, the District Judge reiterated his explanation of Finding No. 41:

> "The Court: I was not going to make any finding that there was negligence on the part of Mr. Atlass individually.
>
> "Mr. Yowell: Personally, you mean with respect to the Limitation of Liability Act.
>
> "The Court: Personally, right, because the minute I did that, then the limitation principle wasn't applicable, and I felt there hadn't been any personal negligence since he was 500 or how many miles away and had been for two days when the accident happened. He didn't know where they were going to dinner or what they were doing. It wasn't his dock, it wasn't his shipyard. I saw no reason for finding that he personally and individually was negligent. *That the area was not a safe place in which to work, that all the other things which I found, I found,* but—." (Appellants' Brief and pp. 37a-38a.) (Italics ours)

One cannot read the trial judge's extended explanation summarized in the petition at pp. 7-8 with references to the printed appendix, or the references in full or the trial judge's findings 27 and 39 and conclusion 4 (Petition, pp. 8a, 10a, 12a) and honestly deny that the trial judge held respondents liable on account of proximately causative employer negligence.

There being some employer negligence, the finding that Atlass was not *personally* responsible was irrelevant on the exoneration issue. *Rogers* v. *Missouri Pacific R.R. Company,* 352 U.S. 500, 506-507.

The Irrelevance of Employee Negligence

(Brief, pp. 6-8, 10)

Besides an attack upon the accuracy and integrity of counsel, respondents have, as before, dwelt at great length upon the condition of Muth and Darr, painting a dark picture of two derelicts. Respondents' purpose is clear, of course: why should this Court be concerned about a couple of drunks?

Upon an examination of the record, the Court would be startled with the actual character of the evidence said to establish drunkenness. See, Statement of Facts in Appellants' Brief in the court below on the first appeal, pp. 13-18, and argument thereon, pp. 44-50. Also see, the comments of the trial judge on remand, Appellants' Brief and Appendix in the court below on the second appeal, pp. 22a-23a.

But the condition of Muth and Darr and the trial court's findings thereon and the findings of the court below thereon are not relevant because there was *some* employer negligence. *Rogers* v. *Missouri Pacific R.R. Company,* 352

U.S. 500, 506-507. When on remand the trial judge explained his original intention to find that some employer negligence played a part in the deaths, the court below on appeal erred in refusing to re-examine its basis of decision.

The brief in opposition discloses no reason why the court below could not have reexamined the case nor does it disclose any reason why the writ should not be granted.

The Employer's Failure to Provide A Safe Means of Ingress

(Brief, pp. 8-9)

The statement of the court below in the first appeal that "that portion of the findings that the walkway was obstructed by timbers, planks, *debris* and *other obstacles,* is without substantial support" was a straw man. The finding thus "corrected" by the court below was contained in Finding No. 27 (Petition, p. 8a) and read:

> "Part of the five foot width of the walkway was obstructed by timbers and planks."

Note that this finding did not include a finding that the walkway was obstructed by *debris* and *other obstacles.* The trial judge also found:

> "Considering the debris and other obstacles on the walkway, dock and railbed and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and railbed at the time of the drowning was insufficient."

Evidence of debris and other obstacles on the dock and railbed was ample. It was the totality of the conditions for ingress that made access by any route hazardous (Finding of Fact 27, Petition p. 8a), and lighting insufficient (Finding of Fact 39, Petition p. 10a).

With respect to the finding as to the presence of timbers and planks on the walkway and with respect to Finding No. 39, there was substantial evidence including a stipulation of facts omitted from respondents appendix on the cross appeal on the first appeal. (Record 99-101) There were photographs showing the presence of the timbers and planks on the walkway. (See Claimants' Exhibits 41 and 42 in the Muth Reply Brief in No. 709, October Term, 1965, pp. 2a-3a) The planks were shown to be on the walkway and did obstruct part of it. (Transcript p. 220 omitted from Respondents' Supplemental Appendix in the court below on the first appeal.) They were referred to by respondents' witness, Smith. (Reply Appendix, p. 2 in the court below on the first appeal) These obstructions lay in practically total darkness. (Respondents' Supplemental Appendix in the court below on the first appeal, p. 97) They necessarily cut down the five-foot width of the walkway. It was established by respondents' own expert that only the outer two feet of the walkway received as much as .4 of a foot candle of light. (Respondents' Supplemental Appendix in the court below on the first appeal, p. 101) To the extent that the court reviewed the findings, it did not properly apply *McAllister* v. *United States,* 348 U.S. 19, 20 (1954).

With respect to the so-called extraordinary statement of the trial judge on remand (brief in opposition, p. 9) we submit that this statement demonstrated that the trial judge had a sound understanding of the clear error rule. See, Reply Brief in the court below on the second appeal, pp. 11-12.

Conclusion

It is noted that the brief in opposition contains no conclusion specifying with particularity the relief to which respondents believe themselves entitled. It otherwise fails to conform to the rules of this court. Of course, this Court will not grant a petition merely by reason of default on the part of respondents. We suggest, however, that the character of the brief in opposition inadvertently discloses substantial reasons why the writ should be granted. It is hoped that on the occasion of this petition from a judgment that would forever foreclose the rights of petitioners that no member of this Court will be deceived by respondents' semantic slight-of-hand.

Wherefore, petitioners pray that the writ be granted.

Respectfully submitted,

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